No. 15471

United States Court of Appeals

for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

SAFEWAY STORES, INC.,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

FILE
JUN 11 1957
PAUL P. O'BRIEN, C

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—6-17-57

No. 15471

United States Court of Appeals

for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

SAFEWAY STORES, INC.,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—6-17-57

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

LAUGHLIN E. WATERS,
U. S. Attorney;

LOUIS LEE ABBOTT,
Asst. U. S. Attorney, Chief, Criminal Division;

JOHN K. DUNCAN,
Asst. U. S. Attorney,
600 Federal Building,
Los Angeles 12, California.

For Appellee:

GIBSON, DUNN & CRUTCHER,
JULIAN O. VON KALINOWSKI,
634 South Spring Street,
Los Angeles 14, California.

United States District Court for the Southern District of California, Central Division

February, 1956, Grand Jury

No. 25141-CD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAFEWAY STORES, INC., a Corporation,

Defendant.

INDICTMENT

[U.S.C., Title 21, Sec. 78—Shipment of Food Products Not Properly Inspected.]

The grand jury charges:

Count One

[U.S.C., Title 21, Sec. 78.]

On or about January 5, 1956, the exact date being to the grand jury unknown, defendant Safeway Stores, Inc., a corporation organized and existing under the laws of the State of Maryland and maintaining a warehouse at 1925 East Vernon Avenue, Los Angeles, California, did unlawfully transport from Los Angeles, California, within the Central Division of the Southern District of California, to the Safeway Store at 1300 East Charleston Boulevard, Las Vegas, Nevada, a quantity of meat food products of cattle and swine, to wit: forty-eight

2¼-ounce Kold Kist steaks, twelve 16-ounce Kold Kist sirloin tips, twelve 16-ounce packages of Kold Kist chili con carne, six 1-pound packages of scrapple, twelve 9-ounce tamales, six 14-ounce packages of enchiladas, six 1¼-pound packages of tamales, and six 15-ounce packages of beef tacos, which [2*] had not been inspected, examined, and marked "Inspected and passed" as required by law. [3]

Count Two

[U.S.C., Title 21, Sec. 78.]

On or about January 13, 1956, the exact date being to the grand jury unknown, defendant Safeway Stores, Inc., a corporation organized and existing under the laws of the State of Maryland and maintaining a warehouse at 1925 East Vernon Avenue, Los Angeles, California, did unlawfully transport from Los Angeles, California, within the Central Division of the Southern District of California, to the Safeway Store at 1300 East Charleston Boulevard, Las Vegas, Nevada, a quantity of meat food products of cattle and swine, to wit: 256 pounds of cured beef briskets, twelve 9-ounce tamales, twelve 8-ounce packages of chili, six 14-ounce packages of enchiladas, six 1¼-pound packages of tamales, six 15-ounce packages of beef tacos, twelve 6-ounce packages of Taco Snax, and six 1-pound packages of enchiladas with refried beans, which had not been inspected, examined, and marked "Inspected and passed" as required by law.

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

A True Bill,

/s/ GEORGE DIETZLER,
Foreman.

/s/ LAUGHLIN E. WATERS,
United States Attorney.

[Endorsed]: Filed July 25, 1956. [4]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS INDICTMENT

To the United States of America and to Laughlin E. Waters and John K. Duncan, Its Attorneys:

Please Take Notice that the defendant, Safeway Stores, Inc., a corporation, on Monday, September 10, 1956, at the hour of 2:00 p.m. on said day, or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Thurmond Clarke, Judge of the above-named court, in the Federal Building at Los Angeles, California, will move that the indictment and each count thereof be dismissed on the following grounds:

1. Each count of the indictment does not state facts sufficient to constitute an offense against the United States in that it affirmatively appears on its face that defendant comes within the exception to the statute upon which the alleged offense is based, exempting retail dealers in meat and meat products supplying their [5] customers.

2. Each count of the indictment does not sufficiently inform the defendant of the nature and cause of the accusation in that:

(a) It fails to specifically allege that defendant does not come within the statutory exception exempting retail dealers in meat and meat products supplying their customers.

(b) It does not appear thereon whether Safeway Stores, Inc., is being charged as a retail dealer in meat and meat products supplying its customers, with the offense created by the statute or otherwise.

3. The indictment was not filed within a reasonable time after its return.

Said motion will be based on the papers, files and indictment in this action, this Notice of Motion and the Memorandum of Points and Authorities in support of said Motion served and filed concurrently herewith.

Dated: August 23, 1956.

GIBSON, DUNN & CRUTCHER,
JULIAN O. VON
KALINOWSKI,

By /s/ JULIAN O. VON
KALINOWSKI,
Attorneys for Defendant,
Safeway Stores, Inc.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 24, 1956. [6]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS INDICTMENT

Introductory Statement

Each count of the indictment is based upon the alleged violations by defendant, Safeway Stores, Inc., of Section 78 of the Meat Inspection Act (21 U.S.C., § 71-91) in the transportation of certain non-federally inspected processed meat products between Safeway's Los Angeles, California, warehouse and its Las Vegas, Nevada, retail store.

Defendant has moved to dismiss the indictment on two basic substantive legal grounds, each of which relates to each count of the indictment:

(1) The indictment affirmatively appears on its face that defendant comes within the exception to the statute upon which the alleged offense is based and therefore has not committed an offense against the United States. [8]

(2) The defendant is not sufficiently informed of the nature and cause of the accusation for the reason, (a) that there is no specific allegation negating the statutory exemption exempting retail dealers in meat and meat products supplying their customers, and, (b) it does not appear whether defendant is being charged as such retail meat products dealer with the offense created by the statute or otherwise.

The primary question involved is whether the indictment affirmatively shows on its face that defendant, Safeway Stores, Inc., is within the exception to the statute and, therefore, could not have committed the statutory offense alleged. If that question is answered in the affirmative, the Motion to Dismiss must be granted. If not, two other questions are presented by the Motion, each, of which, if answered in favor of defendant's contentions, would likewise require a dismissal.

Italics throughout this Memorandum are ours unless otherwise noted.

I.

Each Count of the Indictment Alleges Facts Which Shows That the Defendant Comes Within the Exceptions Provided in the Statute Upon Which the Alleged Offense Is Based, Exempting Retail Dealers in Meat and Meat Products Supplying Their Customers.

Specifically the indictment charges that defend- and transported from its warehouse in Los Angeles to its store in Las Vegas meat products which had not been inspected, examined, and marked "'Inspected and Passed' as required by Law." In order to determine whether a statutory offense has been committed reference must therefore be made to the requirements of the law with respect to inspection of meat products and transportation of those products in interstate commerce.

Section 78 of the Meat Inspection Act makes it unlawful to transport in interstate commerce meat or meat food products which [9] have not been inspected, examined and marked "Inspected and Passed" as required by the provisions of the Meat Inspection Act. Section 91 of the same Act (21 U.S.C. § 91) specifically excepts from the provisions of the Act requiring inspection "retail dealers in meat and meat food products supplying their customers." The statutory language is as follows:

"The provisions of Sections 71-91 of this Title, requiring inspection to be made by the Secretary of Agriculture shall not apply to animals slaughtered by any farmer on the farm and sold and transported in interstate or foreign commerce, nor to retail butchers and retail dealers in meat and meat food products, supplying their customers: * * *."

21 U.S.C. § 91.

Accordingly by the very terms of the statute upon which each count of this indictment is based, a retail dealer in meat and meat products transporting those products in interstate commerce for sale to its customers, is not required to obtain federal inspection of the meat products.

Analyzing the allegations of the indictment, it is apparent that this defendant has not violated the statute: Thus from the statement in the indictment that the defendant was transporting the meat food products from its warehouse to its store coupled with the well-known fact of which the court may

take judicial notice, that Safeway Stores, Inc., is a national retail grocery chain outlet, the court may conclude that the defendant was acting as a "retail dealer in meat and meat food products supplying their cusomers." This being true, the defendant is exempt from the inspection requirements of the Act. It therefore appears on the face of the indictment that these meat food products were not "required by law" to be inspected. Since the indictment does not charge the defendant with a crime under the statute the indictment should be dismissed. [10]

Rule 12(b)(1), Fed. Rules Crim. Proc.

II.

The Indictment and Each Count Thereof Does Not Sufficiently Inform the Defendant of the Nature and Cause of the Accusation in That: (a) It Fails to Specifically Allege That Defendant Does Not Come Within the Statutory Exception Exempting Retail Dealers in Meat and Meat Products Supplying Their Customers, and (b) It Fails to Show Whether Safeway Stores, Inc., Is Being Charged as a Retail Dealer in Meat and Meat Products Supplying Its Customers, With the Statutory Offense or Otherwise. The Indictment Must Therefore Be Dismissed.

We have already shown that the indictment is fatally deficient because it affirmatively shows that the defendant is within the provisions of the exemption to the statutory crime. However, even if

this were not the case, the indictment must fail because of its failure to sufficiently inform the defendant of the nature and cause of the accusation.

It is axiomatic that an indictment which does not sufficiently inform the defendant of the nature and cause of the accusation is fatally deficient and must be dismissed. That the indictment here involves violation of this fundamental principle is manifest from the foregoing analysis of the provisions of the statute upon which the alleged crime is based.

A. The Indictment Fails to Specifically Allege That Defendant Does Not Come Within the Statutory Exemption Relating to Retail Dealers in Meat and Meat Products Supplying Their Customers.

It is well settled that where a statute defining an offense contains an exception which is so incorporated with language defining the offense that the ingredients of offense cannot be accurately and [11] clearly described if the exception is omitted, an indictment founded on such a statute must allege enough to show that the accused is not within the exception. In the leading case of United States vs. Cook (1872), 84 U.S. 168, 21 L. Ed. 538, the court set forth the above rule as follows:

"Where a statute defining an offense contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense can-

not be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception; but if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is matter of defense and must be shown by the accused. Steel vs. Smith, 1 Barn. & Ald. 99; Arch. Cr. Pl., 15th Ed. 54.

"Offenses created by statute, as well as offenses at common law, must be accurately and clearly described in an indictment, and if they cannot be, in any case, without an allegation that the accused is not within an exception contained in the statute defining the offense, it is clear that no indictment founded upon the statute can be a good one which does not contain such an allegation, as it is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offense [12] is composed. Rex vs. Mason, 2 T. R. 581."

United States vs. Cook,
84 U.S. 168, 173-174, 21 L. Ed. 538, 539.

See also:

Hale vs. United States,
(4th Cir. 1937), 89 F. 2d 578.

"It is elementary that every ingredient of the crime must be charged in the bill, a general reference to the provisions of the statute being insufficient. The Schooner Hoppet & Cargo vs. United States, 7 Cranch, 389, 3 L. Ed. 380; Pettibone vs. United States, 148 U.S. 197, 13 S.Ct. 542, 37 L. Ed. 419; United States vs. Standard Brewery, 251 U.S. 210, 40 S.Ct. 139, 64 L. Ed. 229. And 'if the negation of an exception in the enacting clause of a statute is essential to accurately describe the offense, then the accusations of the indictment must show that the accused is not within the exception.' Weare vs. United States (C.C.A. 8th), 1 F. (2d) 617, 620; United States vs. Cook, 17 Wall. 168, 174, 21 L. Ed. 538; Ledbetter vs. United States, 170 U.S. 606, 611, 18 S.Ct. 774, 42 L. Ed. 1162; 31 C.J. 720."

Hale vs. United States, 89 F. 2d 578, 579. It is clear that when the court speaks of an exception in the "enacting clause" of the statute it does not intend to distinguish the section defining the offense from a subsequent section in the same act. The court in United States vs. Cook, supra, said in this regard:

"Cases have also arisen, and others may readily be supposed, where the exception, though in a subsequent clause or section, or even in a subsequent statute, is, nevertheless, clothed in such language, and is so incorporated as an amendment with the words antecedently employed to define the offense, that it [13] would be impossible to frame the actual

statutory charge in the form of an indictment with accuracy, and the required certainty, without an allegation showing that the accused was not within the exception contained in the subsequent clause, section or statute. Obviously such an exception must be pleaded, as otherwise the indictment would not present the actual statutory accusation, and would also be defective for the want of clearness and certainty. State vs. Abbey, 29 Vt. 66; 1 Bish. Cr. Proc. 2d Ed. § 639, n. 3."

United States vs. Cook,
84 U.S. 168, 174-175, 21 L. Ed. 538, 539-540.

In United States vs. Wood (D.C.N.J. 1907), 159 F. 187, the defendant was charged with violating a statute making it unlawful to bring into the United States any Chinese person "in contravention of the provisions of this Act." In quashing the indictment the Court quoted from United States vs. Cook, supra, and said:

"Here, then, we find an exception in the enacting clause of the statute. The crime is not fully defined by that clause; but we are compelled to look elsewhere to determine what constitutes the crime therein referred to. In such cases good pleading requires that the indictment should allege enough to show that the accused is not within the exception."

United States vs. Wood,
159 F. 187-188.

It should be noted that Section 78 refers to meat or meat food products which have not been inspected "in accordance with the terms of §71-94, inclusive, of this title," thereby necessitating that reference be made to the other sections of the Act to determine if inspection of the meat transported is required under such a statute. It is manifest therefore that the indictment is fatally deficient because it does not allege enough to show that the accused [14] is not within the exceptions in the Act relating to inspection.

We should call to the court's attention the case of United States vs. Mendelsohn (D.C.N.J., 1940), 32 F. Supp. 622, one of the few cases relating to the statutory provisions here involved.[1] This case appears at first blush to be contrary to our contention under this Point II.[2] However, we do not believe that it is controlling here. It is uncertain from the opinion whether the facts alleged in the indictment there involved are similar to the indictment before this court, particularly as to the charge of the alleged offense. Moreover, we submit that the decision is erroneous if it be interpreted to hold that Section 78 of the Act does not incorporate by specific language as a part of the offense the exemptions of Section 91 of that Act. In this connection, as we

---

[1]That the statutory offense here involved has been little used appears manifest from the dearth of authority relating to the statute.

---

[2]This case is not applicable to our Point I hereof as it did not involve that question.

have previously pointed out, Section 78 specifically refers to meat and meat products which have not been inspected as required by Sections 71-94 of the Act. Therefore the exemption by specific language must be referred to in establishing the elements of the statutory offense. Finally, of course, the decision of the New Jersey District Court is not binding in this court.

B. Each Count of the Indictment Is Uncertain in That It Does Not Show Whether Defendant Safeway Stores, Inc., Is Being Charged as a Retail Dealer in Meat and Meat Products Supplying Its Customers With the Statutory Offense, or Otherwise.

The indictment is likewise uncertain for the additional reason that it does not state whether defendant, Safeway Stores, Inc., [15] is being charged as a retail dealer in meat supplying its customers with the offense prescribed by the Act, or as a slaughterer, packer, canner or meat processor.

It is an oft-stated rule that the indictment must set forth the facts so distinctly as to advise the accused of the charge and give him a fair opportunity to prepare his defense, so particularly that a conviction or acquittal would bar another prosecution for the same offense, and so clearly that the court may determine whether the facts stated support a conviction.

See: Sutton vs. United States (5 Cir. 1946), 157 F. 2d 661, p. 663; United States vs. Lembo (3

Cir. 1950), 184 F. 2d 411; Berger vs. United States (1934), 295 U.S. 78, 81-83, 79 L. Ed. 1314.

The indictment violates this basic constitutional principle in its failure to set forth the character of Safeway's activities allegedly in violation of the Statutory Offense. Therefore the indictment does not contain sufficient facts to enable the defendant to be advised of the charge against it and prepare its defense accordingly.

III.

The Indictment Was Not Filed Within a Reasonable Time After Its Return by the Grand Jury

The indictment shows on its face that it was returned by the February, 1956, Grand Jury. Yet it was not filed until July 25, 1956, some 7 months later. It is submitted that this is unreasonable time in the filing of the charge against this defendant and contravenes Rule 48 (b) of the Federal Rules of Criminal Procedure, and the Sixth Amendment to the United States Constitution guaranteeing a "speedy trial" in all criminal cases. Accordingly the indictment should be dismissed.

Conclusion

For each and all of the foregoing reasons, it is respectfully [16] urged that the indictment be dismissed.

Respectfully submitted,

GIBSON, DUNN & CRUTCHER,
JULIAN O. VON
KALINOWSKI,

By /s/ JULIAN O. VON
KALINOWSKI,
Attorneys for Defendant,
Safeway Stores, Inc.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 24, 1956. [17]

[Title of District Court and Cause.]

OPPOSITION TO MOTION TO DISMISS INDICTMENT AND POINTS AND AUTHORITIES

The government opposes defendant's motion to dismiss the indictment on the following grounds:

1. The indictment states an offense against the United States in that defendant does not come within the statutory exception providing for the exemption of certain persons from the operation of the penal statute.

2. The indictment sufficiently informs defendant of the nature and cause of the accusation.

3. The indictment was filed within a reasonable time after its return.

LAUGHLIN E. WATERS,
United States Attorney;

LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Chief, Criminal Division;

/s/ JOHN K. DUNCAN,
Assistant U. S. Attorney, Attorneys for Plaintiff,
United States of America. [19]

Points and Authorities

I.

The Indictment States Sufficient Facts to Constitute an Offense Against the United States

The defense motion has failed to set out a complete text of United States Code 21, Section 91. The part omitted reads as follows:

"The Secretary of Agriculture is authorized to maintain the inspection in said sections provided for at any slaughtering, meat-canning, salting, packing, rendering, or similar establishment notwithstanding this exception, and that the persons operating the same may be retail butchers and retail dealers or farmers; and where the Secretary of Agriculture shall establish such inspection then the provisions of said sections shall apply notwithstanding this exception."

It is clear that where the Secretary of Agriculture establishes inspection procedures the exceptions provided for in Section 91 are of no effect. The case of United States vs. Lainoff, 101 Fed. Supp. 675 (1951, D.C. E.D., Mo.) is clearly in point. There defendant asserted that he came within the exception as a retail dealer. The Court states at page 677:

"The statute does grant an exemption to retail dealers but the exemption is conditioned on the absence of the establishment of inspection service for such retail dealers. There is not an absence of such inspection regulation. The facts therefore destroy the exemption relied on by the defendant."

In the instant case there is not an absence of inspection regulations. 9 C.F.R., Section 2.1 (1949 edition) provides as follows: [20]

"§2.1 Establishments requiring inspection.

"Every establishment in which cattle, sheep, swine, or goats are slaughtered for transportation or sale as articles of interstate or foreign commerce, or in which meat, meat byproducts, or meat food products of, or derived from, cattle, sheep, swine, or goats are, wholly or in part, canned, cooked, cured, smoked, salted, packed, rendered, or otherwise prepared for transportation or sale as articles of interstate or foreign commerce, which are capable of being used as food for man, shall have inspection under the regulations in this subchapter, except as expressly exempted by Part 4 of this subchapter."

The regulations also provide that those establishments seeking the statutory exemption must make application for same. 9 C.F.R., Section 4.1 provides as follows:

"§4.1 Application for inspection or exemption.

"(a) The proprietor or operatior of each establishment of the kind specified in § 2.1 of this subchapter shall make application to the chief of division for inspection or for exemption from inspection."

Pursuant to the above authority, the government submits that defendant does not come within the exception provided for in 21 U.S.C., Section 91 as contended in defendant's motion.

II.

The Indictment Sufficiently Informs the Defendant of the Nature and Cause of the Accusation

Defendant's motion alleges that it is necessary for the [21] government to specifically allege in the indictment that the defendant does not come within the statutory exemption. Defendant relies heavily upon the case of United States vs. Cook, 84 U.S. 168 (1872). It should be noted primarily that that case held against the contention here asserted by defendant. In that case the question was whether or not it was necessary for the government to allege in the indictment that the defendant came within an ex-

ception to the statute of limitations. The court held that it was not necessary to so allege for the reason that the language of the statute defining the offense was so entirely separable from the exception that the ingredients constituting the offense could be accurately and clearly defined without any reference to the exception. The Court went on to state that the only real question in these cases is whether the exception is so incorporated with the substance of the clause defining the offense as to constitute a material part of the description of the acts, omission, or other ingredients which constitute the offense. In the event that the offense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference as the matter contained in the exception is a matter of defense and must be shown by the accused.

It is the position of the government in the instant case that the indictment alleges all the necessary ingredients contained in Title 21, United States Code, Section 78. It is also the position of the government that even if the rule cited by the defendant were a correct rule of law it would not be applicable in this case because of the fact that the exception contained in Title 21, Section 91 is "an illusory exception." Hence, in no case would it be necessary to plead such exception. [22]

III.

The Indictment Was Filed Within a Reasonable Time After Its Return

This point as asserted by defendant is entirely without merit. The indictment was returned by the grand jury and filed on July 25, 1956. The reference to the February, 1956, Grand Jury contained in the indictment means simply that the grand jury sitting on July 25, 1956, was impaneled as a grand jury in February of 1956.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney;

LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Chief, Criminal Division;

JOHN K. DUNCAN,
Assistant U. S. Attorney, Attorneys for Plaintiff, United States of America.

Receipt of copy acknowledged.

[Endorsed]: Filed September 10, 1956. [23]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS INDICTMENT

In its opposition to defendant's Motion to Dismiss Indictment, the government makes two basic con-

tentions, neither of which is tenable. They are: (1) the indictment states sufficient facts to constitute an offense against the United States in that defendant does not come within the statutory exception, and (2) the indictment sufficiently informs defendant of the nature and cause of the accusation.

I.

The Indictment Does Not State an Offense Against the United States as It Is Clear That Defendant Is Within the Statutory Exception

Defendant contends that it is exempt under 21 U.S.C. § 91, as a "retail dealer," from the inspection provisions [25] of §§ 71-91.[1] The government now contends that defendant is not exempt as § 91 authorizes the Secretary of Agriculture to maintain inspection at certain establishments even though operated by retail dealers, that such inspection procedure has been established by the Secretary of Agriculture, and that the exception provided by § 91 is therefore of no effect. The basis for this contention is a proviso in § 91 authorizing the Secretary of Agriculture to maintain the inspection provided for in §§ 71-91 at establishments where certain op-

---

[1] "The provisions of Sections 71-91 of this title, requiring inspection to be made by the Secretary of Agriculture shall not apply to animals slaughtered by any farmer on the farm and sold and transported in interstate or foreign commerce, nor to retail butchers and retail dealers in meat and meat food products, supplying their customers: * * *"

erations on meat or meat products are performed.[2] However, the proviso relied on by the government is clearly inapplicable to the instant proceeding. The only charge in each count of the indictment is that defendant "did unlawfully transport" certain meat or meat products from its warehouse to its store. There is no allegation in either count of the indictment that defendant operated any "slaughtering, meat canning, salting, packing, rendering, or similar establishment," the only establishments at which the Secretary of Agriculture is authorized to establish inspections. Thus, there is no indication that defendant was engaged in any of the activities which would authorize the Secretary of Agriculture to maintain inspection procedures. Since defendant is not alleged to have engaged in any of these activities, defendant is obviously within the exception provided by § 91 hereinbefore referred to. It is, therefore, apparent that defendant has not violated 21 U.S.C., § 78. [26]

The case of United States vs. Lainoff (E.D. Mo. 1951) 101 F. Supp. 75 is clearly distinguishable from the instant case. The defendant in that case was engaged in activities covered by regulations established by the Secretary of Agriculture. How-

---

[2]"The Secretary of Agriculture is authorized to maintain the inspection in Sections 71-91 of this title provided for at any slaughtering, meat canning, salting, packing, rendering, or similar establishment notwithstanding this exception, and that the persons operating the same may be retail butchers and retail dealers or farmers; * * *"

ever, in the instant case, no inspection regulations are involved as there is no allegation that this defendant engaged in any of the activities which the Secretary of Agriculture is authorized to regulate by inspection.

As shown above, § 91 not only fails to support the government's contention, but conclusively shows that defendant is excepted from the coverage of §§ 71-91. Similarly, the regulation relied on by the government, 9 C.F.R., § 2.1, also shows that defendant is not covered by inspection regulations. This regulation covers establishments in which animals are slaughtered or in which meat or meat products are "canned, cooked, cured, smoked, salted, packed, rendered, or otherwise prepared for transportation or sale." However, there is no allegation in either count of the indictment that the defendant operated any establishment in which any such activities took place. In both counts, it is merely alleged that defendant "did unlawfully transport" meat products from its warehouse to its store. Thus, it is clear on its face that this regulation does not apply in the instant case. Furthermore, the scope of this regulation can be no greater than the power given the Secretary of Agriculture by § 91 to establish inspection and, for the reasons previously set forth, the alleged acts of defendant are not within the scope of that power.

The government has failed to show that defendant is not exempt under § 91. Similarly, the government has failed to show that the Secretary of Agriculture

had any power to regulate the acts of defendant here in question or that the Secretary of Agriculture established any regulation seeking to control such acts. [27] It appears on the face of the indictment that the meat food products here in question were not "required by law" to be federally inspected. Therefore, since the indictment does not charge defendant with a crime under the statute, the indictment should be dismissed.

II.

The Indictment Does Not Sufficiently Inform Defendant of the Nature and Cause of the Accusation.

Defendant contends that the indictment is defective in two respects: (1) it fails to specifically allege that defendant does not come within the statutory exemption relating to retail dealers in meat and meat products supplying their customers, and (2) it does not show whether defendant is being charged as a retail dealer in meat and meat products supplying its customers, or otherwise. In answer to these contentions, the government asserts merely that if the offense may be defined without reference to the exception, the government may omit any such reference as the exception is a matter of defense and must be shown by the accused. However, as shown by defendant in its earlier Points and Authorities, § 78, the section which defendant allegedly violated, specifically refers to §§ 71-94 of Title 21. Therefore, the very section in question requires a reference to some twenty-four sections of Title 21. Defendant

submits that it is obvious that the exception is so incorporated with the substance of the clause defining the offense as to constitute a material part of the description of the act, omission, or other ingredient constituting the offense. It is impossible to define the offense clearly and accurately without referring to the exception.

The government alternately contends that if defendant is right in its contention that the indictment is defective for failing to specifically allege that defendant does not come within [28] the exemption, that rule would not be applicable because the exception contained in § 91 is "an illusory exception." While the government does not attempt to explain why it is "an illusory exception," a reading of the government's Points and Authorities indicates that the government considers § 91 to be "an illusory exception" because the Secretary of Agriculture may establish inspection of certain activities and thus allegedly destroy the exception. However, the government fails to recognize that the power given the Secretary of Agriculture to establish inspection of certain establishments is not as broad as the exception granted to retail dealers by § 91. As hereinbefore pointed out, § 91 does not authorize the Secretary of Agriculture to establish regulations concerning the inspection of all retail dealers in meat, but merely to inspect establishments where certain activities are engaged in, whether they are engaged in by retail dealers or not.

For both the foregoing reasons, the indictment does not contain sufficient facts to enable the defendant to be advised of the charge against it and prepare its defense accordingly.

Conclusion

For each and all of the foregoing reasons it is respectfully urged that the indictment be dismissed.

Respectfully submitted,

GIBSON, DUNN & CRUTCHER,
JULIAN O. VON
KALINOWSKI,

By /s/ JULIAN O. VON
KALINOWSKI,
Attorneys for Defendant,
Safeway Stores, Inc.

Receipt of copy acknowledged.

[Endorsed]: Filed October 1, 1956. [29]

[Title of District Court and Cause.]

SUPPLEMENTAL POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS INDICTMENT

In its motion to dismiss indictment defendant has continually asserted two basic contentions. They are (1) that defendant is within the statutory exception provided for in Title 21, United States Code, Section 91; (2) the indictment does not sufficiently

inform defendant of the nature and cause of the accusation.

LAUGHLIN E. WATERS,
United States Attorney;

LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Chief, Criminal Division.

/s/ JOHN K. DUNCAN,
Assistant U. S. Attorney, Attorneys for Plaintiff,
United States of America. [31]

Points and Authorities

I.
Defendant Is Not Within the Statutory Exception

Defendant contends in its motion to dismiss indictment that the Secretary of Agriculture has no power to regulate the type of activities in which the defendant is engaged. Defendant relies strongly on the language of Title 21, United States Code, Section 91, stating that the Secretary of Agriculture has power to maintain inspection at any slaughtering, meat canning, salting, packing, rendering, or similar establishment, and also states that the exemption granted to retail dealers is broader than the power given the Secretary to regulate. In short, defendant contends that the exemption given to retail dealers can be negative by the Secretary only where the dealer engages in slaughtering, meat canning, salting, packing, or rendering.

In determining the validity of this proposition, the Government submits that the reason for the exception created by Section 91 must be considered. Why did the Congress create an exception through the conduct proscribed in Section 78 and then state that the Secretary of Agriculture could negative this exception by maintaining inspection. The Government submits that the Congress realized that certain retail dealers in meat food products would require inspection of meat products shipped in interstate commerce. The Congress realized that some retail operations would by their nature require inspection, hence the Secretary was given the power to establish such inspection as he deemed necessary in establishments where meat food products were handled. [32]

Defendant has ignored the import of the words "similar establishment" in Section 91. The Secretary has taken the view that they created a broad power of inspection, as manifested by the regulations. 9 C.F.R., Section 2.1, provides in pertinent part as follows:

"Every establishment in which * * * meat by-products * * * are, wholly or in part, canned, cooked, cured, smoked, salted, packed, rendered, or otherwise prepared for transportation or sale as articles of interstate or foreign commerce * * * shall have inspection * * *"

Defendant argues in its motion that the Secretary has established no regulations seeking to control the

type of conduct in which defendant is engaged. It would appear that in making this contention defendant has ignored the clear meaning of the language underlined above. It is apparent from this language that the Secretary of Agriculture intended that all meat products intended for transportation in interstate commerce should be inspected, and that exemptions from inspection were to be allowed only in the manner prescribed in 9 C.F.R., Section 4.1.

Defendant has argued orally that the government has not established that inspection procedures were established at defendant's warehouse. Defendant has again ignored the clear language in the regulations; 9 C.F.R., Section 4.1 makes it clear that the establishments preparing meat products for interstate shipment must apply for inspection or exemption. Defendant has not only failed to apply for inspection, it has failed to apply for the exemption which it now so strongly asserts. [33] The cases are too numerous to cite holding that a defendant must exhaust his administrative remedies before he is entitled to judicial review of his position.

The government submits that defendant is not entitled to claim the statutory exemption for the reasons stated above.

II.

The Indictment Sufficiently Informs Defendant of the Nature and Cause of the Accusation

Defendant contends in its motion to dismiss indictment that it is necessary for the government to

allege in the indictment that the defendant does not come within the statutory exemption relating to retail dealers. Defendant mentioned briefly the case of United States vs. Mendelsohn, (D.C.N.J.) 32 Fed. Supp. 622 (1940) and attempted to distinguish it from the present case with the general statement that it is not clear from the opinion whether the facts alleged there were similar to the instant indictment. The fact is that the Mendelsohn case presents precisely the same issue that defendant now asserts. In that case the defendant was charged with violation of the same statute as is the instant defendant. The defendant moved to dismiss the indictment on the ground that the government had failed to allege that defendant was not within the exemption contained in the statute. The defendant there asserted the same cases as controlling as are here asserted, principally the case of United States vs. Cook, 84 U.S. 168. The court in a well-reasoned opinion held that the elements of the offense as set out in Title 21, United States Code, Section 78, were fully set forth in the indictment and that if defendant came within the exemption contained in Section 91 his remedy was not by motion to quash but rather that it was incumbent upon him to set it up as a matter of defense. [34]

Defendant also contends that the indictment is defective in that it does not state whether defendant is charged as a retail dealer in meat and meat products supplying its customers or otherwise. The government submits that the indictment is in the

language of the state which states simply that no person, firm or corporation shall transport in interstate commerce meat food products that have not been inspected and marked. If defendant is not sufficiently informed of the nature of the charge as stated in the indictment, its remedy is by way of a bill of particulars and not by way of a motion to dismiss.

For the above-stated reasons the government submits that the motion to dismiss should be denied.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney;

LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Chief, Criminal Division.

/s/ JOHN K. DUNCAN,
Assistant U. S. Attorney, Attorneys for Plaintiff,
United States of America.

Affidavit of service by mail attached.

[Endorsed]: Filed October 8, 1956. [35]

[Title of District Court and Cause.]

MINUTES OF THE COURT
October 16th, 1956

Present: Hon. Thurmond Clarke, District Judge;

U. S. Att'y, by Ass't U. S. Att'y: No appearance.

Counsel for defendant: No appearance.

Proceedings:

Ruling on submitted matter:

It Is Hereby Ordered that the motion of the Defendant heretofore heard and submitted on Sept. 10, 1956, is granted.

Counsel for the Defendant is directed to prepare and file dismissal within ten days.

Counsel notified.

JOHN A. CHILDRESS,
Clerk;

By E. J. FISHER,
Deputy Clerk. [37]

United States District Court for the Southern District of California, Central Division

No. 25141—CD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAFEWAY STORES, INC., a Corporation,

Defendant.

ORDER DISMISSING INDICTMENT

This cause came on to be heard on Defendant's Motion to Dismiss the Indictment, and each count thereof, and the Court having heard the argument of counsel, having read the Points and Authorities submitted by Plaintiff and Defendant, having taken the matter under submission, and being fully advised, it is

Ordered, that the Defendant's Motion be, and it hereby is granted, and that the Indictment, and each count thereof, be and the same hereby is dismissed.

Dated: October 24, 1956.

/s/ THURMOND CLARKE,
United States District Judge.

Approved as to form:

/s/ JOHN K. DUNCAN.

[Endorsed]: Filed October 24, 1956. [38]

[Title of District Court and Cause.]

NOTICE OF APPEAL

(Pursuant § 3731, Title 18, US.C.; Rule 37, Fed. Rules of Crim. Procedure, and § 1291, Title 28, U.S.C.)

The appellant is the United States of America. Appellant's attorney is Laughlin E. Waters, United States Attorney, by Louis Lee Abbott, Assistant United States Attorney, Chief of Criminal Division, and John K. Duncan, Assistant United States Attorney. The address of appellant and appellant's attorney is 600 Federal Building, Los Angeles 12, California.

This appeal is from a judgment and order of the Honorable Thurmond Clarke, United States District Judge, entered on October 24, 1956, dismissing the indictment in the herein case.

The judgment appealed from is that certain order and judgment of the Honorable Thurmond Clarke, United States District Judge, who granted the motion of the defendant to dismiss the herein indictment. [39]

The above appellant, the United States of America, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the above-stated judgment granting the motion to dismiss the herein indictment.

Dated: November 21, 1956.

LAUGHLIN E. WATERS,
United States Attorney;

LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Chief of Criminal Division;

/s/ JOHN K. DUNCAN,
Assistant U. S. Attorney.

[Endorsed]: Filed November 21, 1956. [40]

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Southern District of California—ss.

John K. Duncan, being first duly sworn, deposes and says:

That he is at all times herein stated and pertinent to the trial of this case, an Assistant U. S. Attorney for the Southern District of California, a member of the bar of this honorable court; that as a part of his duties he was assigned to oppose the appellee's Motion to Dismiss Indictment;

That he has had correspondence with the Department of Justice relative to the prosecution of the herein appeal and that the Department of Justice has requested an extension of time to docket the record on appeal herein from the 31st day of December, 1956, to and including the 11th day of February, 1957, upon the [41] ground that such additional time is necessary for the convenience of the

Government in resolving whether or not the appeal should be further prosecuted.

/s/ JOHN K. DUNCAN.

ORDER

Good cause having been shown therefor,

It Is Hereby Ordered that the time for docketing the record on appeal is extended from the 31st day of December, 1956, to and including the 11th day of February, 1957.

Dated: December 31, 1956.

/s/ WM. C. MATHES,
United States District Judge.

Affidavit of service by mail attached.

[Endorsed]: Filed December 31, 1956. [42]

[Title of District Court and Cause.]

AFFIDAVIT AND REQUEST FOR EXTENSION OF TIME TO DOCKET RECORD ON APPEAL

United States of America,
Southern District of California—ss.

John K. Duncan, being first duly sworn, deposes and says:

That he is at all times herein stated and pertinent to the trial of this case an Assistant United States

Attorney for the Southern District of California, a member of the bar of this honorable court; that as a part of his duties he was assigned to oppose the appellee's Motion to Dismiss Indictment;

That he has had correspondence with The Department of Justice relative to the prosecution of the herein appeal and that The Solicitor General authorized appeal by telegram on February 5, 1957; [44]

That it will be impossible to docket the record on appeal by February 11, 1957, the date to which the time for docketing the record on appeal has heretofore been extended by order of the United States District Court for the Southern District of California.

Accordingly, it is requested that additional time be granted to docket the record on appeal; to wit, up to and including March 11, 1957.

/s/ JOHN K. DUNCAN.

Subscribed and Sworn to before me this 8th day of February, 1957.

JOHN A. CHILDRESS,
Clerk, United States District Court, Southern District of California.

By /s/ H. L. COFFEY,
Deputy.

ORDER

Good cause having been shown therefor,

It Is Hereby Ordered that the time for docketing the record on appeal is extended from the 11th day of February, 1957, to and including the 11th day of March, 1957.

Dated: February 8, 1957.

/s/ THURMOND CLARKE,
United States District Judge.

[Endorsed]: Filed February 8, 1957. [45]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 47, inclusive, containing the original:

Indictment;
Notice of Motion to Dismiss Indictment;
Memorandum of Points & Authorities in Support of Motion to Dismiss Indictment;
Opposition to Motion to Dismiss Indictment and Points & Authorities;

Memorandum of Points & Authorities in Support of Motion to Dismiss Indictment;

Supplemental Points & Authorities in Opposition to Defendant's Motion to Dismiss Indictment;

Order Dismissing Indictment;

Notice of Appeal;

Affidavit of John K. Duncan, Asst. U. S. Attorney in Support of Request for Extension of Time to Docket Record on Appeal; & Order Thereon;

Affidavit of John K. Duncan, Asst. U. S. Attorney and Request for Extension of Time to Docket Record on Appeal & Order Thereon;

Stipulation as to Contents of Record; (Designation of Record);

and a full, true and correct copy of the Minutes of the Court on October 16, 1956;

I further certify that my fee for preparing the foregoing record amounting to $1.60, has not been paid by appellant.

Witness my hand and the seal of said District Court, this 7th day of March, 1957.

JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy. [46]

[Endorsed]: No. 15471. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Safeway Stores, Inc., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 8, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15471

UNITED STATES OF AMERICA,

Appellant,

vs.

SAFEWAY STORES, INC., a Corporation,

Appellee.

STATEMENT OF POINTS ON WHICH APPELANT INTENDS TO RELY ON APPEAL

Appellant will rely on the following points in the prosecution of the appeal from the Order Dismissing Indictment in the above-entitled cause:

1. The Indictment is sufficient to state an offense against the United States.

2. The Trial Court erred in dismissing the Indictment.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney;

LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Chief, Criminal Division;

/s/ JOHN K. DUNCAN,
Assistant U. S. Attorney, Attorneys for Appellant,
United States of America.

[Endorsed]: Filed May 10, 1957.